RECORD AND BRIEFS

Supreme Court, U.S.
FILED
OCT 11 2016
OFFICE OF THE CLERK

No. 16-149

IN THE
Supreme Court of the United States

COVENTRY HEALTH CARE OF MISSOURI, INC.,

Petitioner,

v.

JODIE NEVILS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Missouri

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

Respondent Jodie Nevils explicitly agrees that "certiorari should be granted" on both federal questions Coventry's petition presents. Resp. Br. 29. He could hardly do otherwise. Indeed, Nevils himself emphatically underscores many of the reasons Coventry identified why this Court's intervention is urgently warranted to resolve both questions. He candidly concedes (at 2, 12-20) that federal and state courts are irreconcilably split on the "important" question whether the Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. § 8901 *et seq.*—which governs health benefits of millions of federal employees and dependents—preempts state laws that prevent FEHBA carriers from seeking subrogation and reimbursement as required by their contracts with the Office of Personnel Management ("OPM"). And while Nevils implausibly denies the separate lower-court conflict regarding the constitutionality of FEHBA's express-preemption provision, *id.* § 8902(m)(1)—which a supermajority of the Missouri Supreme Court held invalid—he admits (at 20) that this constitutional question nevertheless merits this Court's review because the question is both "undeniably important" and in any event "unavoidable."

Nevils further expressly "acknowledges that this case provides an optimal vehicle" to decide both federal questions. Resp. Br. 20. Indeed, he agrees that "[t]his case ... is admittedly the *best* vehicle" to provide definitive guidance on these recurring questions that is either "available" now or likely to arise in the foreseeable future. *Id.* at 2 (emphasis added). A more clear-cut case for certiorari is difficult to fathom.

Nevils spends the remainder of his submission previewing his defense of the decision below on the merits. None of his contentions is well-taken; they simply repeat many of the errors in the Missouri Supreme Court's misguided statutory and constitutional holdings, which Nevils urges this Court (at 29) to "embrace." In any event, as Nevils necessarily acknowledges in expressly supporting certiorari (*ibid.*), none of his merits arguments provides any reason to forestall this Court's review.

Definitive resolution of the scope and validity of FEHBA's preemption provision is long overdue. And every imaginable obstacle to review in this case has now undisputedly been eliminated. This Court should grant review and correct the Missouri Supreme Court's distortions of federal law.

The petition should be granted.

I. BOTH QUESTIONS PRESENTED UNDISPUTEDLY MERIT THIS COURT'S REVIEW.

All agree that both questions Coventry's petition presents—concerning the correct interpretation and constitutionality of FEHBA's preemption provision, respectively—merit this Court's review. Both questions are undisputedly important and recurring, and each has fomented intractable lower-court confusion.

A. Nevils overtly "concedes" (at 2) that the first question presented—whether Section 8902(m)(1) encompasses state antisubrogation and antireimbursement laws—is "certworthy." He agrees (at 13) that this issue implicates "fundamental questions" of the intersection of federal and state law and agencies' role in administering federal statutes. And he does not dispute the stakes, which affect the benefits of millions of federal workers and family members.

Nevils also agrees (at 12) that "there is a split over whether FEHBA's express-preemption provision displaces state laws that prohibit insurance carriers from seeking reimbursement or subrogation from tort victims," which only this Court can resolve. He admits (at 12-13) that the Missouri Supreme Court's holding that FEHBA does not preempt such state laws (Pet. App. 5a-12a) directly conflicts with decisions of the Eighth and Tenth Circuits and the Arizona Court of Appeals, each of which has expressly held the opposite. *See Bell* v. *Blue Cross & Blue Shield of Okla.*, 823 F.3d 1198, 1200-05 (8th Cir. 2016); *Helfrich* v. *Blue Cross & Blue Shield Ass'n*, 804 F.3d 1090, 1109-10 (10th Cir. 2015); *Kobold* v. *Aetna Life Ins. Co.* (*Kobold II*), 370 P.3d 128, 130-32 (Ariz. Ct. App. 2016), *petition for review filed*, No. CV-16-0082-PR (Ariz. June 1, 2016). As Nevils notes (at 12-13), the decision below "openly acknowledged that it was parting ways with" *Helfrich* and *Kobold II*. And the Eighth Circuit in *Bell* in turn expressly "disagree[d] with the Missouri Supreme Court" here, thus "creat[ing] an untenable conflict between state and federal courts in the same state." *Id.* at 2, 13.*

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* Despite conceding the split and urging this Court to resolve it, Nevils curiously quibbles (at 12-13 n.1) over its precise scope, reprising his claim from his unsuccessful opposition to Coventry's prior petition that *Thurman* v. *State Farm Mutual Automobile Insurance Co.*, 598 S.E.2d 448 (Ga. 2004), did not decide the preemption issue. As Coventry and the United States each explained then, *Thurman* explicitly and necessarily decided the preemption issue in resolving the ultimate question of state insurance law: But for FEHBA, state law would have barred the insurer from seeking reimbursement out of the proceeds of the participant's settlement with a third party. *Id.* at 450-51; U.S. *Amicus* Br. 16, No. 13-1305 (U.S. May 22, 2015); Cert. Reply 2-3, No. 13-1305 (U.S. July 16, 2014). In any event, with or without *Thurman*, Nevils agrees (at 2) that the split is "certworthy."

B. Nevils also agrees (at 18-20) that the second question presented—whether Section 8902(m)(1) violates the Supremacy Clause, as the decision below held—merits this Court's review. He disputes (at 18-19) that the lower courts are divided on this issue, but he mischaracterizes or disregards their decisions.

Nevils admits (at 19) that *Empire HealthChoice Assurance, Inc.* v. *McVeigh*, 396 F.3d 136, 143 (2d Cir. 2005) (Sotomayor, J.), *aff'd*, 547 U.S. 677 (2006), directly addressed the issue, and resolved it by sensibly construing Section 8902(m)(1) to avoid the constitutional question. He urges the Court to ignore the Second Circuit's decision, however, because this Court *affirmed* that ruling without reaching the issue. But Nevils does not (and cannot) contend that this Court's ruling in *McVeigh* cast any doubt on the Second Circuit's analysis of that issue of Section 8902(m)(1)'s meaning. Tellingly, both the Eighth Circuit in *Bell* and the dissent from the Missouri Supreme Court's original opinion in this case—which six members of that court have now endorsed, and Nevils urges this Court to embrace—have understood then-Judge Sotomayor's opinion as still good law. 823 F.3d at 1204-05; Pet. App. 67a-71a.

Nevils downplays *Bell* (at 19) because the Eighth Circuit deemed the constitutional issue forfeited. But the court immediately *went on* to explain that it perceived no "obvious error" that would warrant *overlooking* that forfeiture—and in doing so expressly relied on the Second Circuit's conclusion in *McVeigh*. 823 F.3d at 1204. While it is true, as Nevils stresses (at 21), that that procedural posture makes *Bell* an inferior vehicle for certiorari, it does nothing to diminish the resulting lower-court disagreement or the need for this Court's intervention.

Nevils finally writes off the Arizona Court of Appeals' decision in *Kobold II*, which he describes (at 19) as "not addressing [the] Supremacy Clause issue." The Arizona court's opinion on its face refutes that description. As Coventry explained (Pet. 30-31), *Kobold II* considered and expressly rejected the claim that Section 8902(m)(1) violates "the Supremacy Clause because it gives preemptive effect to contract terms rather than federal law." 370 P.3d at 131 n.2.

In any event, Nevils's attempt to paper over this direct lower-court disagreement is academic because, as Nevils admits (at 19-20), the Missouri Supreme Court's holding that Section 8902(m)(1) violates the Supremacy Clause nevertheless warrants review. The constitutionality of that provision, and the ramifications for other preemption provisions that similarly tie the scope of preemption to particular contracts, from the Federal Arbitration Act, 9 U.S.C. § 2, to the Employee Retirement Income Security Act, 29 U.S.C. § 1144(a), are "undeniably important." Resp. Br. 20; *cf.* Pet. 33. And "a state's invalidation of a duly enacted federal statute—as here—is an important consideration for certiorari review," Resp. Br. 20, particularly where the statute affects a massive federal program serving millions of beneficiaries.

As Nevils acknowledges (at 20), moreover, the constitutional "issue is unavoidable: The Court would have to resolve the constitutionality" of Section 8902(m)(1) "if FEHBA's express-preemption provision is to stand." It would be wasteful and inefficient to decide *only* the statutory-interpretation question of Section 8902(m)(1)'s scope, because the Missouri Supreme Court has already made clear that, *whatever* the range of state laws this Court

holds Section 8902(m)(1) to preempt, in Missouri that provision is now a dead letter.

II. All Agree That This Case Is The Best Vehicle To Address Both Federal Issues.

Nevils also agrees (at 20) that, as Coventry demonstrated (Pet. 35-37), "this case provides an optimal vehicle" to decide both questions presented. As he underscores, "this case ... squarely presents both the statutory-interpretation and Supremacy Clause questions." Resp. Br. 20. Nevils acknowledges that "both issues were thoroughly pressed and passed upon below." *Ibid.* (internal quotation marks omitted). And, abandoning his meritless suggestion in unsuccessfully opposing Coventry's prior petition that the FEHBA contract did not authorize it to seek reimbursement, *cf.* Pet. 37; Br. in Opp. 15-19, No. 13-1305 (U.S. June 30, 2014), Nevils concedes (at 18) that whether FEHBA validly preempts Missouri's anti-subrogation law is "outcome-determinative" here.

Indeed, Nevils rightly notes that this case "is admittedly the *best* vehicle for finally resolving the important matters" Coventry's petition presents. Resp. Br. 2-3 (emphasis added). Although other federal and state courts have collectively rejected every plank of the Missouri Supreme Court's reasoning, "[t]his is the only live case presenting *all*" of the issues the case implicates: the best interpretation of Section 8902(m)(1)—either as an original matter, or pursuant to principles of deference to OPM's interpretation in a notice-and-comment regulation—and Section 8902(m)(1)'s constitutionality. *Id.* at 3 (emphasis added). If the Court were to decline review here, it would either have to await another case addressing *all* of those questions, grant review in multiple cases that each addressed only smaller pieces of

the larger puzzle, or decide one or more of the issues without the benefit of any ruling below.

Deferring review would be particularly imprudent because, as Nevil further notes, no viable candidates are on the immediate horizon. The "only other live case" with even a "possibility of certiorari review," he concedes (at 20-21), is the Eighth Circuit's decision in *Bell*, "in which a petition for certiorari is forthcoming." But as Nevils explains (at 21-22), this case is a "superior vehicle" to *Bell*—and Nevils should know, as his counsel of record here is also counsel of record for the eventual petitioner in *Bell*. *See Bell* v. *Blue Cross & Blue Shield of Okla.*, No. 16A163 (U.S. Sept. 13, 2016) (granting second extension application). As Nevils underscores (at 20-22), *Bell* does not cleanly present the constitutional issue, because the plaintiff's forfeiture of the constitutional challenge could prevent this Court from reaching that issue; and in rejecting the interpretation of Section 8902(m)(1) urged here by Nevils, the Eighth Circuit expressly reserved judgment on whether OPM's interpretation is entitled to dispositive deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *see* 823 F.3d at 1202-05.

Nevils's admission that the only other potential vehicle—being handled by his own counsel, and which may not be fully briefed for months—is inferior to this case tells the Court everything it needs to know. The Court should seize the opportunity this case provides to resolve all of the important federal questions this case presents without delay.

III. NEVILS'S DEFENSES OF THE DECISION BELOW ARE IRRELEVANT AND UNSUSTAINABLE.

Having cemented the case for certiorari, Nevils turns (at 22-29) to prefiguring his defense of the Missouri Supreme Court's holdings on the statutory and constitutional merits. He does not pretend that his arguments, even if well-founded, provide any reason to decline review here. Quite the contrary, Nevils concludes (at 29) by explicitly urging that Coventry's petition "should be granted" precisely because of the importance of these issues and the confusion they have fomented. The Court accordingly need not tarry over Nevils's merits arguments now, but should grant plenary review to resolve both questions after full briefing and argument. Lest Nevils's contentions leave the misimpression that the merits questions are close, however, a brief response is warranted.

A. Nevils defends (at 22-25) the Missouri Supreme Court's crabbed reading of Section 8902(m)(1), but tellingly never addresses its *text*. The statute expressly "preempt[s] any State or local law" that prevents enforcement of "[t]he terms of any contract" under FEHBA which "relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits)." 5 U.S.C. § 8902(m)(1). Nevils offers no way to square the Missouri court's construction with that text even standing alone, still less with that text read in light of this Court's precedents construing similar preemption provisions, *cf.* Pet. 19-22—precedents Nevils never mentions.

Nevils begins instead (at 22-24) with the presumption against preemption. But he disregards this Court's recent, controlling holding that the presumption is categorically inapplicable to express-preemption provisions such as Section 8902(m)(1).

See Puerto Rico v. *Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016). And Nevils's assertion (at 23) that *federal* contracts with a *federal* agency governing benefits of *federal* employees under a *federal* statute somehow implicate a traditional *state-law* domain is as strained as it sounds. *Cf.* Pet. 28.

In any event, the presumption does not help Nevils because, never engaging with the text at all, he necessarily fails to identify any genuine ambiguity. His *best* evidence of supposed ambiguity is dictum in *McVeigh*, 547 U.S. 677, which Nevils claims "all but mandate[s] 'a narrow interpretation'" of Section 8902(m)(1). Resp. Br. 22-23 (citation omitted). But as Coventry and the government have explained, far from mandating a narrow construction or even establishing ambiguity, *McVeigh* expressly *reserved judgment* on Section 8902(m)(1)'s scope. 547 U.S. at 698 ("we need not choose between" proffered interpretations); *see* Pet. 22; Pet. App. 181a-82a.

Nevils also quotes a passing allusion in the government's brief below to "'preexisting ambiguity,'" but clips that phrase out of context. Resp. Br. 22 (citation omitted). What the quoted sentence said was that "[t]he agency's [*i.e.*, OPM's] rule, in short, authoritatively resolved *any* preexisting ambiguity in the statute." Pet. App. 201a-02a (emphasis added). The government, moreover, had already told the Missouri Supreme Court—in this case, years after *McVeigh*—that "§ 8902(m)(1) *unambiguously* preempts Missouri's anti-subrogation rule." *Id.* at 175a (emphasis added) (capitalization omitted). Nevils's defense of the Missouri Supreme Court's statutory analysis only underscores its serious errors.

B. Nevils's unsubstantiated assertion of ambiguity gets him nowhere because courts "presum[e] that Congress, when it left ambiguity in [the] statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 740-41 (1996). Congress expressly empowered OPM to administer FEHBA, including by promulgating regulations, 5 U.S.C. § 8913(a), and OPM exercised that authority here to codify its pro-preemption interpretation of Section 8902(m)(1) in a notice-and-comment regulation that carries the force of federal law, 5 C.F.R. § 890.106(h). Under *Chevron* and decades of this Court's decisions since, OPM's interpretation controls if it is "reasonable." *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009). Even the Missouri Supreme Court did not suggest that OPM's reading fell short of that threshold.

Nevils does not attempt to defend the reason the Missouri Supreme Court *did* give for nevertheless withholding deference: its sweeping pronouncement that *Chevron* is categorically inapplicable to express-preemption provisions. Pet. App. 5a, 9a-12a. As Coventry showed, that position runs headlong into this Court's cases—including *Smiley*, 517 U.S at 744, and *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 496-97 (1996), which deferred to federal agencies' reasonable interpretations of the scope of federal statutes that preempted state law. *Cf.* Pet. 25-27. Nevils has no answer to these precedents.

Instead, Nevils tries (at 25-26) to evade deference by asserting that OPM's regulation departs from its (really, its predecessor's) position. An agency's change of position, however, is irrelevant to the degree of deference owed under *Chevron*. *See Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). In any event, as Coventry showed in detail below, Nevils's claim of agency inconsistency is pure fiction. The sources Nevils cites (at 26)—principally a 1975 report by the Comptroller General—show only that, *before* Congress enacted FEHBA's express-preemption provision in *1978*, there was uncertainty whether OPM's predecessor (the Civil Service Commission) could issue regulations addressing preemption. Coventry Mo. S. Ct. Br. 73-77 (Nov. 16, 2015). Congress enacted Section 8902(m)(1) specifically to "clear up the doubt and confusion" regarding the agency's "clear authority to issue regulations restricting the application of state laws." S. Rep. No. 95-903, at 4 (1978). OPM (created the same year) has understood Section 8902(m)(1) "since Congress enacted it in 1978" as preempting state antisubrogation and antireimbursement laws, and its 2015 regulation simply "formalize[d]" that well-settled understanding in a binding rule. OPM, *Final Rule, Federal Employees Health Benefits Program; Subrogation and Reimbursement Recovery*, 80 Fed. Reg. 29,203, 29,204 (May 21, 2015).

C. Nevils's defense of the Missouri Supreme Court's separate holding striking down Section 8902(m)(1) as violating the Supremacy Clause likewise only magnifies the court's errors. Nevils recites (at 27-28) the truism that only "Laws" are "supreme." But he never addresses the obvious solution to the purported constitutional puzzle he poses: Section 8902(m)(1) is best read as giving *federal law* preemp-

tive force, simply defining the *scope* of preemption by reference to contracts, as many statutes do. Pet. 30-31. At a minimum, as the Second and Eighth Circuits have held, the statute "reasonably" can, and therefore *must*, be so construed, which avoids any constitutional concern. *McVeigh*, 396 F.3d at 144; *Bell*, 823 F.3d at 1204-05.

Nevils suggests (at 28) that the avoidance canon *supports* the decision below, but its holding completely inverts that principle. Rather than sensibly construing FEHBA to avoid a constitutional problem, the court below needlessly construed the statute to *create* one—and proceeded to invalidate Section 8902(m)(1) *in toto*. That holding eviscerates the preemption provision and puts the fair and efficient administration of the FEHBA program in jeopardy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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October 11, 2016